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No. 88-1463

In The

Supreme Court of the United States

October Term, 1988

THOMAS W. WRENN,

Petitioner,

vs.

STATE INDUSTRIAL INSURANCE SYSTEM, an Agency of the STATE OF NEVADA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the United States Supreme Court have jurisdiction to grant a Petition for a Writ of Certiorari where the petitioner raised the federal questions for the first time in a Petition for Rehearing of the state court's decision and the state court did not address or consider the question?

2. Does the decision of the Nevada Supreme Court present a sufficiently substantial and important federal question to warrant granting a Petition of a Writ of Certiorari?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondents hereby submit this brief in opposition to the Petition for a Writ of Certiorari.

JURISDICTION

Respondents respectfully submit that the jurisdictional requirements of 28 U.S.C. §1257(3) have not been satisfied by petitioner, and for that reason this Court should decline jurisdiction of this case.

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

28 U.S.C. §1257(3)

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Supreme Court Rule 17.1

> .1. A review on writ of certiorari is not a matter of right, but a judicial discretion, and will be granted only when there are special and important reasons therefore. . . .

Supreme Court Rule 21.1(h)

> (h) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

NRAP[1] *28(a)(2) and 28(b)*

(a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated: . . .

(2) A statement of the issues presented for review.

. . .

(b) *Brief of the respondent.* The brief of the respondent shall conform to the requirements of subdivision (a)(1)-(4), except that a statement of the issues or of the case need not be made unless the respondent is dissatisfied with the statement of the appellant.

NRAP 40(c)(1)

(c) Scope of Application; When rehearing Considered.

(1) . . . no point may be raised for the first time on rehearing.

Nevada Revised Statutes

NRS 616.2535.

Appointment to represent certain claimants; Request; inquiry by appeals officer; appointment.

1. Any claimant may request the appointment of the state industrial attorney to represent him. The request must be made in writing.

2. The appeals officer shall consider each request within a reasonable time and shall make any inquiry as he deems necessary. If the appeals officer finds that the claimant would be better served by legal representation in his case, the appeals officer shall appoint the state industrial claimants' attorney to represent him. (1977, p.886; 1983, p.478; 1985, p.667.)

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[1] "NRAP" is an abbreviation for the Nevada Rules of Appellate Procedure.

NRS 616.2537 provides in relevant part:

1. The state industrial claimant's attorney shall, when appointed by an appeals officer, represent without charge a claimant before the appeals officer or the district court.

2. When representing a claimant, the state industrial claimants' attorneys shall:

(a) Advise the claimant and present his case to the appeals officer; and

(b) Present in the district court an appeal from the decision of the appeals officer if, in the opinion of the state industrial claimants' attorney, the appeal is merited.

NRS 99.040 provides in relevant part:

1. When there is no express contract in writing fixing a different rate of interest, interest must be allowed. . . . :

(c) Upon money received to the use and benefit of another and detained without his consent.

(d) Upon wages or salary, if it is unpaid when due, after demand therefore has been made.

STATEMENT OF THE CASE

The Petitioner, Thomas W. Wrenn, suffered an industrial injury to his left eye in 1961 which was accepted by the then Nevada Industrial Commission (hereinafter NIC).[2] The Petitioner suffered a subsequent injury to the left eye in 1978. The Petitioner filed an appeal of the NIC

[2] Now known as the State Industrial Insurance System (SIIS), the respondent.

determination which affixed compensation benefits as of the date of the original injury (1961). The State Industrial Claimants' Attorney was appointed to represent him.

On May 25, 1979, the Appeals Officer issued an order which aggrieved the Petitioner. The State Industrial Claimants' Attorney, John Godfrey, by written correspondence dated May 31, 1979 advised the Petitioner that under his statutory discretion, he felt that an appeal to the Eighth Judicial District Court of Nevada was not merited and declined to proceed further with the appeal.[3] The Petitioner retained private counsel and appealed to District Court and in Case No. A 218104 the Eighth Judicial District Court of Nevada reversed the Appeals Officer's decision of May 25, 1979. That matter was then appealed to the Nevada Supreme Court by the State Industrial Insurance System. The Supreme Court dismissed the appeal on March 11, 1985 thereby ruling in favor of the Petitioner.

The Petitioner later filed an appeal of the determination of the State Industrial Insurance System to deny an award of attorney's fees and interest on the compensation benefits due the Petitioner. On July 15, 1986, the Appeals Officer entered its Order granting the Petitioner prejudgment interest on the compensation benefits and denying the award of attorney's fees.

On August 14, 1986, Petitioner filed a Petition for Judicial Review before the Eighth Judicial District Court of Nevada in Case No. A 250176, appealing that portion

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[3] The State Industrial Claimants' Attorney has no connection to respondent.

of the Appeals Officer's decision which denied the award of attorney's fees. On that date, the State Industrial Insurance System filed its petition for Judicial Review appealing that portion of the decision which granted an award of interest on the compensation benefits. The State Industrial Insurance System filed a Motion for Consolidation on December 2, 1986, and an Order was entered by the District Court consolidating these two appeals.

After briefing the issue, on December 15, 1987, the District Court entered its Order affirming the Appeals Officer's decision with respect to the award of interest and reversing the Appeals Officer on the award of attorney's fees. On January 13, 1988, the respondent State Industrial Insurance System filed an appeal to the Nevada Supreme Court. The matter was fully briefed and oral argument conducted on October 12, 1988.

On October 24, 1988, the Nevada Supreme Court ruled that the Petitioner was not entitled to an award of interest nor attorney's fee on a workman's compensation claim because the Nevada legislature had never authorized such awards. The Nevada Supreme Court held that the creation of additional benefits was best left to the legislature.

On November 8, 1988, the Petitioner filed a Petition for Rehearing before the Nevada Supreme Court and for the very first time raised a federal question, one of violation of the Equal Protection provisions of the United States Constitution. On December 6, 1988, the Nevada Supreme Court denied the Petition for Rehearing without opinion, citing NRAP 40(c) which provides in part that "no point may be raised for the first time on rehearing."

STAGE AT WHICH THE FEDERAL QUESTIONS WERE RAISED

As detailed in Respondent's Statement of the Case and the argument which follows, petitioner did nothing to specially set up or claim his alleged federal constitutional rights until the Petition for Rehearing to the Nevada Supreme Court.

ARGUMENT

I.

The Supreme Court does not have jurisdiction to review a state court decision where the federal questions were raised by the petitioner for the first time in a petition for rehearing of the state court's decision and when the state court never addressed or considered the purported federal questions.

It is a long settled rule that the jurisdiction of the United States Supreme Court to reexamine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. *Webb v. Webb*, 451 U.S. 493, 496 (1981). Because this case presents a petition for a writ of certiorari to a state court, the relevant jurisdictional statute is 28 U.S.C. §1257. As applied to the circumstances of this case, that statute requires that in the state courts petitioner has "specially set up or claimed under the constitution . . . of . . . the United States" those rights which he now seeks to have this Court enforce. 28 U.S.C. §1257(3). *Webb v. Webb*, 451 U.S. 493, 495 (1981).

Supreme Court, Rule 21.1(h) requires a petitioner to "specify the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised: *the method or manner of raising them* and the way in which they were passed upon by the court." (Emphasis added.)

In the Petitioner's jurisdictional statement, the Petitioner admits that he raised the federal questions in this case for the first time in his petition for rehearing before the Nevada Supreme Court. The Petitioner argues, "[that] prior to the decision in *Weaver v. SIIS*, 104 Nev. ___, 756 P.2d 1195 (1988), the Nevada Supreme Court had not acted upon either of the questions raised by Wrenn, and there was no reason to believe the [Nevada] Supreme Court would enter the decision that it did and therefore *the constitutional issue was not raised at the Appeals Officer level, the Trial Court [District Court, appellate review], or in the proceedings before the Nevada Supreme Court.*" (Page 7, 8 of Petition for Writ of Certiorari) (Emphasis added) Petitioner failed to satisfy the jurisdictional requirement that federal questions be specifically set up or claimed. It was incumbent upon petitioner to affirmatively argue the possible constitutional issues in the case at the appeals officer and district court levels in addition to the Nevada Supreme Court. In other words, at all stages when the question as to the purported violation of the Equal Protection was at issue, petitioner was required to inform the court of the federal questions he now seeks to raise.

With the exception of the within petition and the Petition for Rehearing of the Nevada Supreme Court's decision, petitioner never mentioned that his claim had raised federal constitutional questions.

In deciding whether a federal question has been "specifically set up or claimed" within the meaning of 28 U.S.C. §1257(3), it is relevant and usually sufficient to ask whether the petitioner satisfied the state rules governing presentation of the issues. *See, e.g., Beck v. Washington*, 369 U.S. 541, 549-554 (1962), *Food Employees v. Valley Plaza*, 391 U.S. 308, 334-335 (1968) (Harlan, J., dissenting).

As is manifest from the opinion rendered by the Nevada Supreme Court, the state court never considered the case on the question of constitutional violations. This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts unless the aggrieved party in this Court *affirmatively* show the contrary." (Emphasis added) *Webb v. Webb*, 451 U.S. 493, 495, quoting *Street v. New York*, 394 U.S. 576, 582 (1969). Failure to present the federal question in conformance with the state procedure constitutes adequate and independent grounds of decision barring review in the United States Supreme Court, so long as the state has a legitimate interest in enforcing its procedural rules. *Michigan v. Tyler*, 436 U.S. 499, 512, n.7 (1978); *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952).

It is clear in this case that petitioner has failed to follow well-established procedural requirements in presenting his purported federal questions to the Nevada Supreme Court. Federal questions which the highest state is, by its settled practice, justified in disregarding, either because not assigned or because not noticed or relied upon in the brief or argument of counsel, will not serve as the basis of a writ of error from the federal Supreme

Court. *Beck v. Washington, supra; Hulbert v. Chicago,* 202 U.S. 275, 281 (1906).

It is settled under Nevada law that constitutional issues not raised or passed upon by the trial court will seldom be considered by the Nevada Supreme Court on appeal. *Munoz v. State, ex rel. Dep't of Hwys.*, 92 New. 441, 444, 552 P.2d 42, 43-44 (1976), citing *Tennessee v. Dunlap,* 426 U.S. 312 (1976). Rule 28(a)(2) and Rule 28(b) of the Nevada Rules of Appellate Procedure required Petitioner to set forth in his answering brief a statement of the issues presented for review, if dissatisfied with the statement of issues presented by the Petitioner.[4] Unless there has been clear error, the Nevada Supreme Court will not consider questions which have not been raised in the briefs or in oral argument. *Wittenberg v. Wittenberg,* 56 Nev. 42, 455-456, 55 P.2d 619, 624 (1936); *Walker v. Burkham,* 67 Nev. 541, 577, 222 P.2d 205, 223 (1950).

Moreover, it is established by rule in Nevada that "no point may be raised for the first time on rehearing." NRAP 40(c)(1). *Powell v. N.C. & O.Ry,* 28 Nev. 305, 82 P. 96 (1905); *State v. Ceja,* 53 Nev. 281, 2 P.2d 124 (1931); *In re Lorring,* 75 Nev. 330, 335, 340 P.2d 589 (1959); *Stanfill v. State,* 99 Nev. 499, 665 P.2d 1146 (1983). This Court has recognized the reasonableness of Nevada procedural rules in the past. *N.-C.-O. Ry. v. Burris,* 38 Nev. 156, 145 P. 926 (1914), *aff'd* 224 U.S. 103 (1917). (Refusal of trial court

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[4] A copy of the issues presented for review in respondent's answering brief to the Nevada Supreme Court is included herein as Appendix A. No constitutional issue was raised.

to allow leave to amend answer at trial in order to assert a federal question).

It has been repeatedly emphasized by this Court that it is too late to raise a federal question for the first time in a petition for rehearing, after the final judgment of the state court of last resort.

> [I]t is elementary that a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking the jurisdiction of this court unless the court below in dealing with the petition for rehearing considers and passes on the federal ground therein relied upon. . . .

Bowe v. Scott, 233 U.S. 658, 663 (1914); *see also Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945).

The Nevada Supreme Court denied the Petition for Rehearing using the following language: "Rehearing denied. NRAP 40(c). It is so ORDERED." The citation to NRAP 40(c) (quoted in part above) indicates that the Petition was denied on procedural grounds. A cursory denial of a petition for rehearing does not constitute a decision on the merits as to the federal questions raised in the petition. *Consol. Turnpike Co. v. Norfolk & O.V. Ry. Co.*, 228 U.S. 326, 333-334 (1913); *Forbes v. State Council of Virginia*, 216 U.S. 396, 398-399 (1910).

Petitioner cannot claim that he was surprised by the Nevada Supreme Court's decision, as the Nevada Supreme Court decided the issue of interest on worker's compensation benefits in the previously decided case of *Weaver v. SIIS* on June 28, 1988, *supra*. The Petitioner requested an opportunity to supplement his brief after

Weaver v. SIIS, supra, was decided and before oral argument in this case. The SIIS filed no opposition and Petitioner filed his supplemental brief. The supplemental brief did not raise a constitutional argument and later, at oral argument the Petitioner never raised the purported federal question.

In the same vein, the Nevada Supreme Court had previously decided the issue of attorney's fees in *State Industrial Insurance System v. Snapp,* 100 Nev. 290, 680 P.2d 590 (1984). Therefore, the Petitioner cannot claim he was surprised by the Nevada Supreme Court's decision in this case and cannot raise the issue on rehearing. *Herndon v. Georgia,* 295 U.S. 441 (1934).

Jurisdictional requirements that federal constitutional issues must be presented to and decided by the highest state court is not formal, but is rather grounded upon policy.

> [T]here are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.

Webb v. Webb, 451 U.S. 493, 499 (1981). These policy considerations include comity, development of the record, identification of adequate and independent state grounds, and judicial economy. *Id.* at 499-501. These considerations indicate that this instant petition must be denied for lack of jurisdiction.

II.

The constitutional questions raised by the petitioner are not sufficiently substantial or important to warrant certiorari.

The U.S. Supreme Court has clearly stated that, "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore." Supreme Court Rule 17.1

The instant case concerns a decision of the Nevada Supreme Court in which an award of interest and attorney's fees to a workmen's compensation claimant was denied. The Petitioner argues that the decision violates the mandates of the Equal Protection clause of the United States Constitution. It is clear that the issues and decision involved in the case at bar were based upon an adequate and independent nonfederal question on state grounds.

The Petitioner argues that, "the statutes [NRS 616.2537 and NRS 99.040] as construed by the Nevada Supreme Court thereby invidiously discriminate against the handicapped and indigent workmen who are compelled to litigate to receive their benefits and unlike the class of workmen who are afforded the free services of the State Industrial Claimant's Attorney must compensate their counsel out of their award." A careful review of the two Nevada statutes under review reveals that neither denies benefits to anyone, but in fact both *create* benefits to certain members of a class.

NRS 616.2537 provides for the appointment of the State Industrial Claimants' Attorney, paid for by the state, to an injured worker for the purpose of an administrative

law hearing before the Appeals Officer without charge to the worker. NRS 616.2537 further provides that the State Industrial Claimants' Attorney shall represent the claimant in District Court "if, in the opinion of the state industrial claimants' attorney, the appeal is merited." In the case at bar, the State Industrial Claimants' Attorney did not believe his clients case to be meritorious and exercised his statutory discretion in declining to represent the claimant in District Court. The Nevada Supreme Court held that "NRS 616.2537 does not mandate the appointment of . . . [an] [a]ttorney to represent all claims free of charge in proceedings before either the appeals officer or the district court." The court further held that, "the [Nevada] legislature had not authorized an award of attorney's fees in worker's compensation cases except in limited circumstances not applicable here." The Petitioner requests that this Court create an entitlement to benefits which the Nevada Supreme Court refused to create in deference to the state legislature. It is obvious that the requested entitlement is a purely "local" issue with no federal consequences, which should be and has been resolved by the highest state court.

It is interesting to note that NRS 99.040 does not specifically deny benefits but in fact confers them. NRS 99.040(c) and (d) provides for the award of interest on *contracts* either express or implied by law upon unpaid wages or money detained without consent. The Nevada Supreme Court held that NRS 99.040 is unapplicable in a case involving worker's compensation benefits. *Weaver v. SIIS, supra. SIIS v. Wrenn,* 104 Nev. ___, 762 P.2d 884 (1988). The Petitioner again suggests that this court confer upon him a benefit which the Nevada Supreme Court

has refused to grant in deference to the law-making branch of government. It is respectfully submitted that the issue of an award of interest in worker's compensation cases is purely local and does not present a substantial federal question for this Court.

The Petitioner has failed to sufficiently establish a substantial federal issue. The Petitioner argues that the decision of the Nevada Supreme Court denies him equal protection of the law. It is clear that the decision of the Nevada Supreme Court was simply an application of Nevada law to the particular facts of the case. There was no classification by the Court as the decision merely affects Petitioner's right to certain benefits. The Petitioner has failed to identify a discrete class subject to the equal protection clauses.

The Petitioner inaccurately suggests that injured workers fall into the category of "indigents", but neglects to apprise this court that NRS 616.2535 provides court appointed attorneys to injured worker *without regard to financial need*. NRS 616.2535 provides the appointment of the State Industrial Claimants' Attorney if the Appeals officer finds that the claimant would be better served by legal representation. The appointments are made without inquiring of the claimant's financial need. The classification of indigency has never been held by the Court to be a suspect class and the Petitioner has failed to identify a fundamental interest. *See James v. Valtierra*, 402 U.S. 137 (1971); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), *Maher v. Roe*, 432 U.S. 464 (1977). For the sake of argument, and if this Court finds a discrete class, the standard of review should be one of

determining whether there is a rational basis for the statutes.

The legitimate purpose served by the Nevada Supreme Court's decision is clear: the role of the Courts is to interpret law and the role of making law is best served by the legislature. The Nevada Supreme Court has consistently denied requests for remedies when the Nevada legislature choose not to expressly confer them. *Goldstine v. Jensen Pre-Cast*, 102 Nev. 630, 729 P.2d 1355 (1986); *Weaver v. SIIS, supra.* The rational basis for not creating these benefits is a fiscal one. The legislature fiscal notes provided to the Nevada Supreme Court indicated that the legislature reviewed the cost of awarding attorney's fees in workers' compensation cases and specifically rejected such a scheme as too financially burdensome.

Under a "rational basis" test, the Court will not attempt to decide on the wisdom and utility of the purported arbitrary classification, and it is clear that states need not "strike at all evils at the same time or in the same way." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). The Nevada Supreme Court must be left to deal with each case on an individual basis on purely local nonfederal questions as those presented at bar.

For the foregoing reasons, it is respectfully submitted that the federal questions presented in this petition are both inapplicable and not sufficiently important or substantial to warrant the granting of the Writ of Certiorari.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted the 26th day of April, 1989.

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APPENDIX A

Introductory Comments

Respondent, THOMAS W. WRENN (hereinafter referred to as "WRENN"), on February 17, 1988, filed a Motion to Dismiss and an accompanying Respondent's Appendix Re: Motion to Dismiss. This was accomplished prior to the docketing of the record on appeal. Therefore, herein, when WRENN refers to an reference in its Respondent's Appendix, he will identify it as "Resp. App.", and will also give the corresponding Record on Appeal "ROA" page numbers.

Appellant, STATE INDUSTRIAL INSURANCE SYSTEM, an Agency of the State of Nevada, will be hereinafter referred to as "SIIS."

STATEMENT OF ISSUES

1. Are workmen's compensation claimants entitled to receive interest on unpaid compensation from the time it should have been paid until it is received under the authority of NRS 99.040?

2. Is a claimant entitled to recover his attorney's fees when he was deprived or representation under NRS 616.253?

STATEMENT OF THE CASE

On July 15, 1986, Appeals Officer Brewer issued Findings of Fact, Conclusions of Law and Decision (Resp. App. pp. 1-14, ROA, Vol. II, pp. 6-29). This decision addressed several issues, which are as follows:

1. Claimant was found to be entitled to have all his back total disability and rehabilitation compensation recalculated, beginning July 3, 1978 and continuing to June 30, 1986, using maximum wage base in effect on July 3, 1978.

2. Claimant was found to be entitled to interest on all back temporary total disability and rehabilitation compensation from July 3, 1978 to June 30, 1986, calculated at rate to twelve percent per annum from date they became due until they were paid.